SUPREME COURT, U. S.

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No. 718

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

ARTHUR B. SACHS AND M. PRIAL CURRAN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

Petitioners respectfully pray that this Court grant rehearing of its order of December 18, 1967, denying the petition for a writ of certiorari in this cause. Petitioners desire to bring to the attention of the Court a substantial ground not previously presented. Rule 58(2), Revised Rules of the Supreme Court of the United States.

REASONS FOR GRANTING REHEARING.

Petitioners have cause to believe that Government agents may have engaged in unconstitutional wiretapping and eavesdropping in connection with their case. The facts and circumstances underlying this belief are set forth in a

letter from petitioners' counsel to the Attorney General dated November 8, 1967, reproduced in Appendix A hereto. The letter sought the Attorney General's "assistance in determining whether the criminal trial of [Sachs and Curran] was tainted by illegal wiretapping and/or eavesdropping carried out by federal agents." The letter added that counsel "have no way of knowing whether Mr. Sachs' offices or phones were, in fact, 'bugged.' We are therefore asking your assistance in determining whether this did occur."

On November 22, 1967, Assistant Attorney General Vinson replied on behalf of the Attorney General; a copy of his letter appears in Appendix B hereto. Mr. Vinson did not say whether any wiretapping or eavesdropping had in fact occurred. Instead, he stated that it was the policy of the Justice Department, pursuant to its memorandum on rehearing of *Schipani* v. *United States*, No. 504, 1966 Term, to notify the appropriate court "when any *material* discovery is made" (emphasis added). He concluded that "our inquiry has produced no information *within the scope* of *Schipani* v. *United States*." (Emphasis added.)

This reply left open the real possibility that wiretapping and/or eavesdropping did, in fact, occur, but that in the opinion of the Justice Department such intrusions did not "materially" affect petitioners' case. Accordingly, counsel for petitioners wrote to Mr. Vinson on December 1, 1967, stating that his letter of November 22, 1967, was not responsive to the original inquiry of "whether any electronic surveillance or other such eavesdropping did in fact occur in this case." This letter is reproduced in Appendix C hereto. To date, no reply from the Assistant Attorney General has been received.[1]

1. In the letter of December 1, 1967, counsel for petitioners requested a "response as promptly as possible because, as you know, my clients' petition for a writ of certiorari . . . is now pending in the Supreme Court. . . ."

Petitioners are not satisfied and respectfully submit that this Court should not be satisfied either. There remains the substantial possibility that the Government did engage in unconstitutional wiretapping and eavesdropping, and that the Justice Department has concluded, *ex parte*, that these intrusions did not "materially" affect the case.

This Court has, in the past, been unwilling to rely on similar judgments by the prosecuting arm of the Government. In *Hoffa* v. *United States*, 387 U. S. 231 (1967) the Solicitor General informed the Court that "conversation between petitioner Burris and one Benjamin Sigelbaum" was overheard as a result of electronic eavesdropping. The Solicitor General assured the Court, however, that "the information obtained through this electronic eavesdropping was not introduced into evidence at trial, that it was never the basis of any investigative lead, and that it was in part already known, through Burris' own statements, to government attorneys." The Solicitor General also contended that any judicial inquiry should be "confined to the conviction of Burris" and not extended to the other petitioners in the case.

The Court rejected these contentions. It said that "We consider it more appropriate that each of these petitioners be provided an opportunity to establish, if he can, that the interception of this particular conversation, or of other conversations, vitiated in some manner his conviction." (387 U. S. at 233.) This is as it must be in an adversary system of justice; the prosecution should not be empowered to finally determine whether information materially affected a case. Counsel for petitioners must be afforded an opportunity to determine this for themselves and, if the facts warrant, to argue that the information may have had a material effect.

Petitioners request this Court to follow a procedure similar to that established in *Hoffa* v. *United States, supra.*

We respectfully ask the Court to inquire of the Solicitor General whether the Government engaged in *any* wiretapping or eavesdropping in connection with this case. See *Black* v. *United States,* 384 U. S. 983 (1966). If the Solicitor General states that it did, the "appropriate procedure" would be:

> "to remand the case to the District Court for a hearing, findings, and conclusions on the nature and relevance to these convictions of the recorded conversation, and of any other conversations that may be shown to have been overheard through similar eavesdropping." *Hoffa* v. *United States, supra,* p. 233.

Moreover, if the Solicitor General informs this Court that the government overheard *any* conversations between petitioners *and their attorneys,* then the Court would have "adequate justification" for holding that "a new trial must be held." *Black* v. *United States,* 384 U. S. 983 (1966); *O'Brien* v. *United States,* 384 U. S. 986 (1967).

The issue raised in this petition for rehearing is identical, in all legal respects, to that raised in *Kolod, Alderman and Alderisio* v. *United States,* No. 133, and we refer the Court to the arguments made and authorities cited therein (especially at pages 4 to 11). In that case, the Court requested the Solicitor General to file a response, see 36 Law Week 3226 (December 4, 1967). We respectfully ask the Court to make the same request here.[2]

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2. In the *Kolod* case, Mr. Justice White, on October 17, 1967, granted petitioners' motion to suspend the order of denial of certiorari pending filing and disposition of a petition for rehearing. We have made a similar motion which—at the time of the preparation of this petition—has not yet been decided.

CONCLUSION.

For the reasons set forth above, it is respectfully urged that rehearing be granted of the Order of December 18, 1967, denying the petition for a writ of certiorari.

Respectfully submitted,

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Attorneys for Petitioners.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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Counsel for Petitioner.